91-1235

Case No.: _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

NICHOLAS G. NAVARRO, SHERIFF OF BROWARD COUNTY,

Petitioner,

vs.

REVIEW PUBLICATIONS, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRUCE W. JOLLY, ESQUIRE
SHAILER, PURDY & JOLLY, P.A.
Attorneys for Petitioner
1322 S.E. Third Avenue
Ft. Lauderdale, Florida 33316
(305) 462-3200
Fla. Bar No. 203637

QUESTION PRESENTED

DOES A PUBLIC OFFICIAL VIOLATE CLEARLY ESTABLISHED LAW WHERE HE DISCONTINUES AN INFORMAL COMMERCIAL RELATIONSHIP WITH A PRIVATE COMPANY IN RETALIATION FOR THAT PRIVATE COMPANY BEING PUBLICLY CRITICAL OF HIS PERFORMANCE IN OFFICE SO AS TO DENY ENTITLEMENT TO QUALIFIED IMMUNITY?

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REVIEW PUBLICATIONS, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, NICHOLAS G. NAVARRO, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 16, 1991.

OPINIONS BELOW

The Final Judgment and Findings of Fact and Conclusions of Law upon which that Final Judgment was based dated February 28, 1990, issued by the United States District Court Trial Judge appear in the Appendix attached hereto. The Order Denying Motion for New Trial (Rehearing) and Motion to Alter or Amend Judgment rendered June 22, 1990, appears in the Appendix hereto. The Order of the United States Court of Appeals for the Eleventh Circuit, dated August 16, 1991, affirming, per curiam, the Final Judgment of the District Court and Order Denying and Petition for Rehearing and Suggestion of Rehearing En Banc dated November 1, 1991, appear in the Appendix attached hereto.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on August 16, 1991. A timely Petition for Rehearing and Suggestion of Rehearing En Banc was denied on November 1, 1991, and this Petition for Certiorari is being timely filed within 90 days of the rendering of that Order. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254(1).

Question Presented

1) Does a public official violate clearly established law where he discontinues an informal commercial relationship with a private company in retaliation for that private company being publicly critical of his performance in office so as to deny entitlement to qualified immunity?

Statutory Provision Involved

United States Code, Title 42 §1983, Civil Action for Deprivation of Rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Review Publications, Inc., (hereinafter referred to as the "REVIEW"), publishes The Broward Review, a daily newspaper published in Fort Lauderdale, Florida, in which legal notices are routinely published.

Petitioner Nicholas G. Navarro (hereinafter referred to as "NAVARRO") is the duly elected Sheriff of Broward County, Florida.

Pursuant to his statutory obligations, NAVARRO conducts Sheriff's sales and initiates contraband forfeiture litigation. Both proceedings are statutorily regulated and require publication of legal notices. Long before NAVARRO'S election as Sheriff, Notices of Sheriff's Sales were published in the The Broward Review. There was no formal agreement between the The Broward Review and Navarro or any of his predecessors in office.

In November of 1988, the The Broward Review published the first of a series of articles highly critical of Navarro's performance in office. Thereafter, Navarro ordered a cessation of placement of advertisements for Sheriff's sales and contraband forfeitures in The Broward Review.

Review filed a lawsuit, predicated upon Title 42 U.S.C. §1983, seeking the issuance of an injunction compelling that Navarro place his advertisements with it, and, seeking an award of damages for lost profits. The Review alleged in the Complaint that Navarro retaliated against it because of the negative articles which it had published thereby violating its civil rights, specifically the First Amendment to the United States Constitution.

Navarro asserted at all relevant stages in the proceedings that he was entitled to immunity from liability by operation of the concept of qualified immunity. After non-jury trial, the District Court entered the Findings of Fact and Conclusions of Law and Final Judgment (Appendix A and Appendix B), awarding compensatory damages against Navarro, individually, in the amount of $22,710.00. In rejecting Navarro's qualified immunity defense, the trial court stated:

> "...[b]ecause Sheriff Navarro fully understood and reasonably should have known that a public official cannot retaliate against a newspaper for its exercise of First Amendment rights, the Sheriff is not entitled to qualified immunity in his personal capacity", and citing Harlow. (Appendix A, Par. 9).

The United States Court of Appeals for the Eleventh Circuit rejected Navarro's qualified immunity defense without

opinion (Appendix D), and subsequently denied Navarro's Suggestion for Rehearing En Banc.

ARGUMENT

Reasons for Granting the Writ

1) The decisions below demonstrate significant and recurring problems concerning the proper application of the defense of qualified immunity in civil rights claims brought under Title 42 U.S.C. §1983.

The trial court held, as affirmed by the United States Court of Appeals for the Eleventh Circuit, that Navarro was not entitled to the defense of qualified immunity from suit, because it was clearly established that a public official may not retaliate against individuals or associations exercise of a right protected by the First Amendment. The trial court chose to paint the contours of the right in such broad terms that it has left a public official personally liable for payment of a Judgment and attorneys' fees simply because he decided to discontinue Sheriff's advertising in a newspaper that publicly attacked him. It was the conclusion of the trial court that the broadly defined protections of the First Amendment as framed by it was sufficiently particular to afford

Navarro instruction that he could not terminate a business relationship with a private contractor in the absence of formalized contract. Most respectfully, Navarro disagrees with the definition of the broad principle of law upon which the trial court and United States Court of Appeals for the Eleventh Court relied in applying qualified immunity to the facts and circumstances of this litigation. Additionally, Navarro suggests the necessity for a further elaboration by the Supreme Court of the time period to be utilized for determining when rights are or are not "clearly established" for purposes of applying the doctrine of qualified immunity so as to avoid further confusion among the circuits.

The present standard for determining whether an official is qualifiedly immune was established in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Although it is axiomatic that an official is entitled to qualified immunity if his navigations were undertaken in constitutionally unchartered waters, the court did not resolve nor precisely define the parameters of a "clearly established" right and specifically reserved the question of what level of court decision could create a clearly established right. Harlow, supra at 818, note 32.

Recently, this Court has acknowledged the difficulty faced by both lower courts and government officials in attempting to properly define the contours of the right against which an official's claim of qualified immunity is to be evaluated. Justice Scalia, writing for the majority in Anderson v. Creighton, 483 U.S. 635 (1987), while discussing qualified immunity, stated:

> "The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process of law is quite clearly established by the due process clause and thus there is a sense in which any action that violates that clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of Harlow.
>
> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, at 639.

The trial judge chose to define the right against which Navarro's immunity was to be evaluated in broad terms which were conceptually the equivalent of Justice Scalia's "due process"

example in Anderson, supra. Navarro suggests that the proper "fact specific" inquiry which should have been used by the trial judge evaluating Navarro's conduct was "should a public official, in a situation like that confronted by Navarro, know or have reason to believe that he could not terminate a business relationship with a private company (a newspaper publisher) because that private company (newspaper publisher) did not support his policies or was otherwise publicly critical of his performance." The broadly defined principle of law used by the trial judge violated the standard established in Anderson, supra. Narrowing the fact specific focus as Navarro has suggested it be framed would have been consistent with Justice Scalia's requirement of a "more particularized" rule, and would have demonstrated Navarro's entitlement to qualified immunity.

There is nothing unique about the struggle faced by officials, judges and litigants in properly focusing the principle of law against which qualified immunity claims must be judged. This struggle occurs daily in every district and circuit in which personal capacity liability is claimed for alleged civil rights violations, and embraces factual circumstances which are not limited to the First Amendment.

In analyzing qualified immunity as applied in this litigation, several sub-issues necessarily arise and require elucidation. For example, where factually similar actions of public officials are reviewed and resolved differently both within one circuit[1] or among different circuits, at what point is the law clearly established? Second, what level of court decision (i.e. district, circuit, or Supreme Court) is required to create a clearly established principle of law against which a public official's conduct can be judged? Third, is there a "buffer" period between the date that a legal right becomes clearly established and the date at which a public official is charged with having operating knowledge of the existence of that legal right. Finally, at what point during the pendency of appellate proceedings is a public official bound to act in accordance with the principle of law established therein as being clearly established while further appellate proceedings are pending?

To this point Navarro has been determined to have violated what he contends is not a clearly established right

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[1]Dartland v. Metropolitan Dade County, 866 F.2d 1321 (11th Cir.1989). Navarro suggests that the holding in Dartland, supra, is diametrically in opposition to the standard presumptively used in the instant lawsuit, and inter-circuit consistency should have compelled that Navarro be qualifiedly immune.

enjoyed by a private for profit business. Navarro contends that the lower courts have erroneously framed the qualified immunity inquiry in too broad a fashion and have applied precedent in support of its analysis which were not sufficiently fact specific with the result that Navarro was improperly stripped of the qualified immunity shield. In order to provide the nation's courts better guidance on how qualified immunity analysis should be conducted, and to assure that public officials are not saddled with the burden of having each action which they take be accompanied by a memorandum from an attorney, it is imperative that the Supreme Court grant certiorari review here.

When Navarro terminated the commercial relationship with the Review, there was only one precedent in the United States which approximated the facts as determined here by the trial court, and which would clearly meet the "more particularized" standard envisioned by the majority opinion in Anderson, supra. In North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330 (5th Cir. 1986), a local governing board withdrew newspaper advertising from a newspaper in retaliation for publication by that newspaper of articles critical of the board's performance. The Circuit Court held that such conduct

violated the civil rights of the publisher. Navarro contends that North Mississippi, supra, cannot properly be characterized for purposes of qualified immunity, as clearly establishing the principle of law that a public official cannot discontinue his commercial dealings with a private business with whom that public official has no formalized agreement. Navarro asserts that an opinion from another court of appeals does not resolve any given issue with certainty so as to be binding precedent upon the actions of governmental officials within geographical boundaries of another court of appeals. For example, a court of appeals has afforded qualified immunity to a public official despite a contrary holding in another circuit. Savidge v. Fincannon, 836 F.2d 898 (5th Cir. 1988), p. 908, n. 48. In Knight v. Mills, 836 F.2d 659 (1st Cir. 1987), the court commented:

> "Even if we assume that these cases could not be distinguished from the case before us, it is nevertheless clear that these cases are not binding on the court...Nor had cases such as Bowring and Ohlinger[2] clearly established such a right that would have been binding on this court." At p. 668.

Notwithstanding that the factual circumstances in North

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[2]Bowring v.Godwin, 551 F.2d 44 (4th Cir. 1977)
Ohlinger v. Watson, 652 F.2d 775 (9th Cir. 1980)

Mississippi are certainly similar to those presented here, at the time that Navarro acted, the underlying litigation had not been finally resolved. The result of the opinion in North Mississippi, supra, was to reverse the granting of a Motion for Directed Verdict. Retrial was required. In those circumstances, the question arises whether the opinion of a circuit court of appeals in remanded litigation clearly establishes a principle of law applicable to other circuit courts of appeal.

Navarro suggests that North Mississippi, supra, does not create a clearly established principle of law prohibiting his behavior here. On that assumption, the inquiry then shifts to whether there is binding precedent from another source establishing the principle. That inquiry involves components of time, geography, authoritativeness, and facts. Simply put, in the context of qualified immunity analysis, questions remain for resolution by this Court as to what level of Court decides when a principle of law is clearly established and, what degree of factual similarity is required. Certiorari is warranted because these questions are inherent and will be repeatedly confronted while no definitive answer towards resolution has been provided

although they have been specifically reserved by this court.[3]

Navarro would respectfully suggest that in November of 1988, there was no fact specific compelling precedent which clearly established the constitutional wrongfulness of his actions. The trial court's rejection of qualified immunity[4] relied upon several cases in support of its determination. The factual circumstances existing in each of the cases differs substantially from that presented here. In denying Navarro's defense, the trial court specifically noted that there was no definitive opinion from the United States Supreme Court, and the only precedent with similar facts was North Mississippi, supra. There is continuing disagreement among the circuits concerning whether a circuit court opinion, even if factually identical to a given situation, can clearly establish a principle of law adequate to overcome an official's claim of qualified immunity. On the one hand, several circuits have bluntly held that no point of law is clearly established until it is decided by the United States Supreme Court. Chincello v. Fenton, 805 F.2d 126 (3rd Cir. 1986),

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[3]Harlow v. Fitzgerald, 457 U.S. 800 (1982), p. 818, n. 32

[4]Appendix C – Order Denying the Motion for New Trial, p. 2,3

Schlothaner v. Robinson, 757 F.2d 196 (8th Cir. 1985). On the other hand, the First and Second Circuits are satisfied that the decisions of Circuit Courts, at least to the extent that there is a fact specific consensus among the circuits, can establish a point clearly enough to defeat a claim of qualified immunity. Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986), Weber v. Dell, 804 F.2d 796 (2nd Cir. 1986). Regardless, the trial court's reliance upon cases with different factual settings illustrates the confusion that continues to exist after this court's pronouncements in Anderson, supra.

Historically, as the concept of qualified immunity has evolved in the Court of Appeals for the Eleventh Circuit after Anderson, supra, the term "clearly established" has required application of a "bright-line" test or standard. See Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989) and Horlock v. Georgia Department of Human Resources, 890 F.2d 388 (11th Cir. 1989). In this instance, it appears that the "bright-line" standard was not utilized when analyzing Navarro's behavior. Rather than judging the Appellant Navarro's behavior by a fact specific "bright-line" test or standard, it appears that the standard for evaluation consisted of reliance on a broadly stated legal truism, "e.g. public

officials shall not abridge freedom of speech." As the trial court noted, there is no fact specific precedent from the United States Court of Appeals for the Eleventh Circuit applicable to define Navarro's behavior as unlawful. Not one of the cases relied upon by the trial court involved a public official's decision to cease advertising in a private newspaper. Reliance by the trial court upon the precedent as recited in the Order Denying the Motion for Rehearing or Motion to Alter or Amend Judgment was appropriate only when one employs the kind of broad "level of generality" which this court has specifically rejected in Anderson, supra. The case authority upon which the trial court relied in denying Navarro qualified immunity are readily and completely factually distinguishable from this litigation, and as a result should provide no useful guidance in analysis of Navarro's claim to qualified immunity.

The most appropriate reason that the contours of the right must be particularized is that when analysis of a right may be conducted on a broad level, any number of precedents can serve to render every action both lawful and unlawful. In the absence of a principle of law that is clearly binding, it will always be questioned whether a public official's actions were obviously

unlawful. This problem has specific application to Navarro in this instance since he has always contended that he could terminate business dealings with a private vendor as long as there is no breach of contract. That decision is, in substantial part, based upon the fact that the private vendor was publicly critical of him or otherwise did not support his policies, and should not strip Navarro of qualified immunity if the analysis was properly focused as Anderson, supra, requires. Rivera Diaz v. Puerto Rico Telephone Company, 724 F.2d 1069 (D. Puerto Rico 1989), Horn v. Keene, 796 F.2d 668 (3rd Cir. 1986), Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982) cert. den.sub.nom., Scherberg v. Bond, 459 U.S. 878 (1982), Messer v. Curci, 881 F.2d 219 (6th Cir. 1989), LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), Triad Associates, Inc. v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989), and Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982). Finally, only when the Supreme Court clearly defines the behavior that is to be unlawful, should a public official be determined to lose the protections afforded by qualified immunity.

CONCLUSION

It is appropriate that the Writ be granted. It is necessary that further guidance be provided by this Court to the lower courts and public officials in how to define that which is or is not clearly established for purposes of analysis of qualified immunity.

Respectfully submitted,

SHAILER, PURDY & JOLLY, P.A.
Attorneys for Petitioner
1322 S.E. Third Avenue
Ft. Lauderdale, Florida 33316
(305) 462-3200

By_____

BRUCE W. JOLLY
Fla. Bar No. 203637

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-1187-CIV-KEHOE

REVIEW PUBLICATIONS, INC.

Plaintiff,

v.

FINDINGS OF FACT
CONCLUSIONS OF LAW

NICHOLAS G. NAVARRO,
Individually and in his
Official Capacity as Sheriff
of Broward County, Florida
and BROWARD COUNTY, FLORIDA

Defendants.

This action was tried before the Court sitting without a jury on December 18 - 19, 1989. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Review Publications, Inc. is a corporation organized and existing under Florida law with its principal place of business at 100 N.E. 7th Street, Miami, Florida. American Lawyer Media, L.P., a limited partnership organized under Delaware law with its principal place of business at 75 Rockefeller Center, New York, New York, has purchased all the assets of Review Publications,

Inc., including The Broward Review. The Broward Review is a newspaper published Monday through Friday, excluding holidays, at 629 South Andrews Avenue, Fort Lauderdale, Broward County, Florida. By Order of this Court dated November 14, 1988, American Lawyer Media, L.P. was substituted as the Plaintiff in this action.

2. Defendant Nicholas G. Navarro ("Sheriff Navarro") is, and was at all times relevant to this case, the Sheriff of Broward County. As Sheriff, he was elected by Broward County Electors. He is the Chief law enforcement officer of Broward County, responsible for formulating, establishing, promulgating, and executing the customs, usages, policies and practices of the Broward County Sheriff's Office.

3. Defendant Broward County, Florida ("the County") is a political subdivision of the State of Florida, organized and existing pursuant to the Constitution and the laws of the State of Florida. Broward County finances the Sheriff's Office budget, including employee salaries and operating expenses.

4. The Plaintiff seeks injunctive relief, damages, costs and attorneys' fees in this action under the First and Fourteenth Amendments to the Constitution of the United States and 42

U.S.C. 1983, arising out of Defendant Sheriff Navarro's termination of advertising of sheriff's sales and of forfeiture proceedings in the Plaintiff's newspaper, The Broward Review.

5. Florida law requires that notices of sheriff's sales be given by advertisement weekly for four successive weeks in a newspaper in the county where the sale is to take place.

6. Florida law requires that an attorney employed by a seizing agency, such as the Broward County Sheriff's Office, to handle forfeiture proceedings must publish notices of those proceedings weekly for two consecutive weeks in a newspaper of general circulation, as defined by Fla. Stat. §165.031 (1987), in the county where the seizure occurred.

7. Since 1968 through November 14, 1988, the Broward Sheriff's Office placed notices of sheriff's sales in The Broward Review. From the beginning of Sheriff Navarro's tenure in office in 1985 through November 14, 1988, Sheriff Navarro's Office placed weekly advertisements for notices of all sheriff's sales, except stolen bicycle sales, in The Broward Review. The Plaintiff received significant advertising revenues from these notices of sheriff's sales.

8. Since 1986 and until early November, 1988, Tripp,

Scott, Conklin & Smith ("Tripp, Scott"), attorneys employed by Sheriff Navarro, placed notices of forfeiture proceedings in The Broward Review. The Plaintiff received significant advertising revenues from these notices.

9. On or around November 14, 1988, Sheriff Navarro's Office placed an order for a sheriff's sale notice in The Broward Review. The notice was published on November 16, November 23, November 30, and December 7, 1988. This was the last order for a notice of sheriff's sale placed by Sheriff Navarro's Office in The Broward Review.

10. On or around November 4, 1988, on behalf of Sheriff Navarro, Tripp, Scott placed an order with The Broward Review to publish a notice of forfeiture proceeding. On November 7 and November 14, 1988, the notice of forfeiture proceeding was published in The Broward Review. This was the last order for a notice of forfeiture proceeding placed by Tripp, Scott on behalf of Sheriff Navarro in The Broward Review.

11. On November 17, 1988, The Broward Review published a front-page story ("the November 17th article") bearing the headline: "NAVARRO FAILED TO ACT ON CORRUPTION WARNINGS." A smaller headline preceding the

article itself reported: "Broward Sheriff didn't pursue reports that a Bahamian cocaine trafficker was bribing his deputies."

12. The Broward Review usually arrives at the Broward Sheriff's office with the mail early in the morning of the date of its issue.

13. On the morning of November 17, 1988, while he was on vacation in the Bahamas, Sheriff Navarro telephoned his office.

14. Sheriff Navarro's Executive Secretary, Marcella Roth, was out of the Sheriff's Office on vacation on November 17, 1988. Sheriff Navarro's secretary, Louise Segno, was in the Sheriff's Office on November 17, 1988. When both Sheriff Navarro and his Executive Secretary, Marcella Roth, are away, it is routine office practice for Louise Segno to summarize newspaper articles about the Sheriff's office for the Sheriff when he telephones his office.

15. The Court finds that on the morning of November 17, 1988, Sheriff Navarro learned about The Broward Review article, "Navarro Failed to Act on Corruption Warnings", and was disturbed by it.

16. Early in the morning of November 17, 1988,

Commander Judy Meyer of the Broward Sheriff's Office Civil Division was called out of a Commanders' Meeting by one of the Sheriff's secretaries to take a telephone call from Sheriff Navarro. In that telephone conversation, Sheriff Navarro ordered Commander Meyer "not to use The Broward Review in the

17. Sometime soon after November 17, 1988, the Supervisor of the Broward Sheriff's Office Media Relations Unit, George Crolius, saw Sheriff Navarro examine the November 17th article in the Sheriff's outer office and heard him say that he could not understand why The Broward Review had given front-page status with a large photo to news which the Sheriff considered old and stale. In the context of criticizing The Broward Review article about him, Sheriff Navarro stated that "perhaps it is now time to discontinue our advertising with The Broward Review". The Sheriff appeared to be hurt and disturbed by the article.

18. Samuel Price, Esq., counsel to Sheriff Navarro, was instructed by Sheriff Navarro to terminate advertising for forfeiture sales in The Broward Review. Price communicated the Sheriff's order to stop advertising in The Broward Review to Detective Sue Peart of the Broward Sheriff's Office forfeiture

unit, who caused this order to be relayed to Tripp, Scott and other law firms employed by the Broward Sheriff's Office to handle forfeiture proceedings.

19. In late November 1988 or early December 1989, Sheriff Navarro called The Broward Review "the Enquirer of Broward", in a conversation at a wedding with a reporter who was considering taking a job with the newspaper. In that conversation, Sheriff Navarro made disparaging comments about the quality of journalism of Andrew Froman, The Broward Review reporter who had written the November 17th article.

20. On or around November 28, 1988, Sheriff Navarro's Office placed an order with the Fort Lauderdale News/Sun-Sentinel to publish a notice of sheriff's sale. That notice was published by the Fort Lauderdale News/Sun-Sentinel on December 6, 13, 20, and 27, 1988.

21. On December 1 and 8, 1988, notices of forfeiture proceedings placed by Tripp, Scott on behalf of Sheriff Navarro were published in the Fort Lauderdale News/Sun-Sentinel.

22. Notice of sheriff's sales and notices of forfeiture proceedings placed by Tripp, Scott on behalf of Sheriff Navarro have been published in the Fort Lauderdale News/Sun-Sentinel

and the Miami Herald since December, 1988. No notices of sheriff's sales or notices of forfeiture proceedings placed by Tripp, Scott on behalf of Sheriff Navarro have been published in The Broward Review since December, 1988.

23. Tripp, Scott continued to place forfeiture notices on behalf of the Florida Department of Highway Safety and Motor Vehicles with The Broward Review after November 17, 1988 at the request of that Department.

24. The decision to terminate advertising in The Broward Review Was made by Sheriff Navarro, a Sheriff of Broward County, Florida. No other person participated in that decision.

25. Sheriff Navarro testified that his sole reason for terminating advertising in The Broward Review was to advertise in a newspaper of wider circulation. He told no one, however, about his reasons for terminating the advertising. No memorandum was prepared of any discussions or investigations preceding the decision, or of the decision itself. He had no complaints about The Broward Review's quality of service or about its compliance with statutory requirements.

26. Sheriff Navarro testified that, sometime prior to November 17, 1988, he called the offices of The Broward Review

and asked the individual who answered what the newspaper's circulation was at that time. Sheriff Navarro did not identify himself to the individual who answered his query, nor did he request or obtain the name or position of that individual.

27. Sheriff Navarro never asked his subordinates to investigate the circulation of The Broward Review, the Fort Lauderdale News/Sun-Sentinel, or the Miami Herald.

28. Nor did Sheriff Navarro ever ask his subordinates before his Office ceased advertising in The Broward Review whether too few people were attending sheriff's sales -- or whether more people attended after his Office switched to the Sun-Sentinel.

29. The Sheriff was never advised of any complaints of insufficient notice to claimants to forfeited property.

30. Neither Sheriff Navarro nor any agent or employee of his Office ever gave the Plaintiff any reasons for his termination of advertising of sheriff's sale and sheriff's forfeiture proceedings in The Broward Review.

31. In Late January or early February, 1989, Sheriff Navarro met Dan Christensen, a reporter whom he knew, in a convenience store. Mr. Christensen told the Sheriff that he had

begun work as a reporter for The Broward Review. The Sheriff asked him if the newspaper was treating him well and paying him well. Mr. Christensen jokingly said yes, but it would have paid him more if the Sheriff had not withdrawn his advertising. The Sheriff sternly replied, "A man's got to do what a man's got to do".

32. After considering the credibility of each of the witnesses who testified at trial, the Court finds that Sheriff Navarro's orders to his subordinates to terminate advertising of sheriff's sales and forfeiture proceedings were substantially, but not completely, motivated by retaliation for the publication of the November 17th article in plaintiff's newspaper.

33. The legal advertising rate charged by The Broward Review in November 1988 was $6.30 per column inch. The legal advertising rate charged by the Fort Lauderdale News/Sun-Sentinel in November 1988 was $13.86 per column inch.

34. The Broward Sheriff's office paid $41,212.77 to the Fort Lauderdale News/Sun-Sentinel for advertising of sheriff's sales between December 1988 and December 1989. Tripp, Scott on behalf of the Sheriff paid $10,520.84 to the Sun-Sentinel and $2,245.02 to the Miami Herald for advertising of forfeiture

proceedings during the same period. At The Broward Review's advertising rate, had it received the same advertising during this period, it would have earned a gross profit of $22,710.14.

35. Any of the foregoing findings of fact which may represent conclusions of law are hereby ADOPTED as conclusions of law.

CONCLUSIONS OF LAW

1. The Court's jurisdiction over this action is founded upon Title 28, United States Code, Sections 1331 and 1343.

2. It is well-settled that "[t]he Government may not retaliate against associations and individuals for their exercise of First Amendment rights . . ." Georgia Ass'n of Educators v. Gwinnett County School Dist., 856 F.2d 142,145 (11th Cir. 1988). See also Perry v. Sindermann, 408 U.S. 593,597,92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). In analyzing a claim of government retaliation in violation of the First Amendment, this Circuit has ruled that two inquiries must be made. Initially, the Court must determine whether the government has terminated a valuable benefit, i.e., whether withdrawal of the benefit has caused the plaintiffs inconvenience and expense. Georgia Ass'n, 856 F.2d at 145. Secondly, the Court must determine whether the termination

was in retaliation for the plaintiff's exercise of First Amendment rights. Id.

3. In the present case, The Broward Review's receipt of government advertising amounts to a valuable benefit within the meaning of Georgia Ass'n, since as a result of its termination, the newspaper has lost substantial revenues. See Findings of Fact, supra, at par. 7, 34. Indeed, the Fifth Circuit Court of Appeals has expressly recognized that government advertising represents "public patronage", which may not be withheld in retaliation for a newspaper's exercise of rights under the First Amendment. North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330, 1337 (5th Cir. 1986). Thus, "although the government may generally choose to place its advertising where it will, it may not make this decision in a fashion designed to punish a newspaper's constitutionally-protected speech". Stipulation at par. A. See also Perry, 408 U.S. at 597, 92 S.Ct. at 2697; Georgia Ass'n, 856 F.2d at 45; North Mississippi, 792 F.2d at 1337.

4. Turning to the second inquiry articulated by the Eleventh Circuit in Georgia Ass'n, i.e., whether termination of the advertising was retaliatory, the Court proceeds under the analytical framework enunciated by the Supreme Court of the

United States in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). Pursuant to that decision, in order to establish a prima facie case of retaliatory withdrawal of government benefits, the Plaintiff was required to show by a preponderance of the evidence that publication of the November 17th article was constitutionally protected and that the article was a substantial or motivating factor in Sheriff Navarro's order to terminate advertising in the Plaintiff's newspaper. ID. See also North Mississippi Communications v. Jones, 874 F.2d 1064, 1065, 1068 (5th Cir. 1989).

5. As a matter of law, the publication of the November 17th article was constitutionally protected conduct. See Agreed-Upon Pretrial Stipulation at par. 8E. See also, e.g. New York Times Co. v. Sullivan, 376 U.S. 272, 270, 275, 84 S.Ct. 710, 721, 723 (1964) (recognizing, in the context of a newspaper publication, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials", and "[t]he right of free public discussion of the

stewardship of public officials . . . [as] a fundamental principle of the American form of government.").

6. Having found that Sheriff Navarro's decision to terminate advertising of Sheriff's sales and forfeiture proceedings in The Broward Review was substantially motivated by retaliation for the publication of the November 17th article, this Court concludes that the Plaintiff established a prima facie case of retaliatory withdrawal of government benefits. See Findings of Fact, supra, at par. 32.

7. Once the Plaintiff established its prima facie case, the burden of proof shifted to the Defendants to prove by a preponderance of the evidence that Sheriff Navarro would have ordered the termination of advertising in The Broward Review even in the absence of the publication of the November 17th article. If the Defendants failed to make this showing, judgment must be entered in favor of the Plaintiff. Mt. Healthy, 429 U.S. at 287, 97 S.Ct. at 576; Allen v. Autauga County Bd. Educ., 685, F.2d 1302, 1305 (11th Cir. 1982); North Mississippi, 874 F.2d at 1065, 1068. See also Stipulation of Plaintiff and the County, Agreed-upon Pretrial Stipulation at par. 9C.

8. The Defendants failed to meet their burden of proof

by showing by a preponderance of the evidence that Sheriff Navarro would have ordered the termination of advertising in The Broward Review even in the absence of the November 17th article.

9. Because Sheriff Navarro fully understood and reasonable should have know that a public official cannot retaliate against a newspaper for its exercise of First amendment rights, the Sheriff is not entitled to qualified immunity in his-personal capacity. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); Georgia Ass'n, 856 F.2d at 145; Berdin v. Duggan, 701 F.2d 909, 913 (11th Cir.), cert. denied, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983).

10. Sheriff Navarro is not liable in his personal capacity for punitive damages because his retaliatory action, while improper, was not reckless and callous.

11. Sheriff Navarro's decision to retaliate against The Broward Review was not reviewable by any other County officer or institution, nor was it limited by any state or local law, ordinance, or policy; it was effectively a final and appealable decision. Berdin, 701 F.2d at 914; Weitzenfeld v. Dierks, 312 So.2d 194,196 (Fla.1975). Thus, Broward County delegated to the

Broward County Sheriff final authority to select a county newspaper in which to advertise sheriff's sales and sheriff's forfeiture proceedings. Mandel v. Doe, 888 F.2d 783, 790-95 (11th Cir. 1989).

12. The County is liable for Sheriff Navarro's retaliatory termination of advertising in the Plaintiff's newspaper because the termination, directed by Sheriff Navarro as the highest policy making county law enforcement officer in the performance of a county function, established a county policy. Monell v. Department of Social Services, 436 U.S. 658, 690 & n.54, 98 S.Ct. 2018 & n.54, 56 L.Ed.2d 611 (1978); Pembaur b. Cincinnati, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986); Parker v. Williams, 862 F.2d 1471, 1478 (11th Cir. 1989); Lucas v. O'Loughlin, 831 F.2d 232, 235 (11th Cir. 1989), cert. denied, ___ U.S. ___, 108 S.Ct. 1595 (1988); Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980).

13. The Court concludes that injunctive relief is not warranted in this case, as it has full confidence that after this litigation, now concluded, Sheriff Navarro will not engage in future acts of retaliation.

14. Any of the foregoing conclusions of law which may

represent findings of fact are hereby ADOPTED as findings of fact.

Therefore it is

ORDERED AND ADJUDGED as follows:

1. That judgement be entered in favor of the Plaintiff against the County for the action of Sheriff Navarro in his official capacity and against Sheriff Navarro in his personal capacity.

2. That compensatory damages be awarded to the Plaintiff in the amount of $22,710.14 against both Defendants; and

3. The Plaintiff's request for punitive damages and injunctive relief be denied.

4. The Court retains jurisdiction of the issues of attorney's fees and costs. The Plaintiff SHALL SUBMIT, within ten (10) days of the date of this Order, any motion(s), memoranda of law and accompanying documentation on these issues which it would like the Court to consider. The Defendants SHALL FILE a reply thereto within ten (10) day thereafter.

DONE AND ORDERED in Chamber at Miami, Florida, this 28th day of February, 1989.

JAMES W. KEHOE

UNITED STATES DISTRICT JUDGE

Copies furnished to:

Bruce W. Greer, Esq., Floyd Abrams, Esq., Bruce W. Jolly, Esq., Alexander Cocalis, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE BI, 89-1187-CIV-KEHOE

REVIEW PUBLICATIONS, INC.,

Plaintiff,

FINAL JUDGEMENT

vs.

NICHOLAS G. NAVARRO,
Individually and in
his Official Capacity
as Sheriff of Broward
County, Florida, and
BROWARD COUNTY, FLORIDA,

Defendants.

Pursuant to the Findings of Fact and Conclusions of Law entered by the Court this date and the mandate of Rule 58, Federal Rules of Civil Procedure, it is hereby ORDERED and ADJUDGED as follows:

1. Judgment is ENTERED in favor of the Plaintiff and against Defendant Broward County for the action of Defendant Sheriff Nicholas G. Navarro in his official capacity and against Sheriff Nicholas G. Navarro in his personal capacity.

2. Compensatory damages in the amount of $22,710.14 are AWARDED to the Plaintiff against both Defendants.

3. The Plaintiff's request for punitive damages is DENIED.

4. Jurisdiction is RESERVED as to the Plaintiff's requests for attorneys' fees and expenses, pursuant to 42 U.S.C. § 1988, and costs, pursuant to Fed. R. Civ. P. 54 (d) and 28 U.S.C. § 1920. The Plaintiff SHALL SUBMIT, within ten (10) days of the date of this Judgment, all motions, memoranda of law and documentation which it Judgment, all motions, memoranda of law and documentation which it would like the Court to consider in regard to the issues of attorney's fees and costs. The Defendants SHALL FILE a reply thereto within ten (10) days thereafter.

DONE against in Chambers at Miami, Florida, this 28th day of Florida, 1990.

JAMES W. KEHOE
U.S. DISTRICT JUDGE

Copies furnished to:
Floyd Abrams, Esq., Bruce W. Greer, Esq., Bruce W. Jolly, Esq., Alexander Cocalis, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-1187-CIV-KEHOE

REVIEW PUBLICATIONS, INC.,

Plaintiff,

VS.

ORDER DENYING MOTION FOR NEW TRIAL (REHEARING) AND MOTION TO ALTER OR AMEND JUDGMENT

NICHOLAS G. NAVARRO, etc.,

et al.,

Defendants.

THIS MATTER arises before the Court upon the motion for new trial (rehearing)/motion to alter or amend the judgment filed by Defendant Sheriff Nicholas G. Navarro ("Sheriff Navarro"). After careful consideration, the Court concludes that the motion is not meritorious.

Sheriff Navarro's motion is based exclusively on the assertion that he is qualifiedly immune from suit. It is well-settled that a public official such as Sheriff Navarro is entitled to qualified immunity for performing discretionary functions if his conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have

known". Harlow b. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). See also McDaniel v. Woodard, 886 F.2d 311, 313 (11th Cir. 1989). There is no dispute that Navarro's termination of advertising in The Broward Review amounted to performance of a discretionary function. However, Navarro contends that since neither this Circuit nor the Supreme Court of the United States has ruled specifically that a public official's termination of a business relationship with an independent contractor in retaliation for the latter's exercise of first amendment rights violates the Constitution, his actions did not violate clearly established law.

In determining whether or not a constitutional right is "clearly established" for qualified immunity purposes, the Court must analyze the law at the time of the conduct in question. In addition, the "test of 'clearly established law' must be applied at a level such that a reasonable public official would understand that the specific action he is taking violates the law". Horlock v. Georgia Dep't of Human Resources, 890 F.2e 388, 394 (11th Cir. 1990). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . .; but it is to say

that in the light of pre-existing law the unlawfulness must be apparent". Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.ed.2d 523 (1987) (emphasis in original). See also green v. Brantley, 719 p.Supp. 1570, 1582 (N.D. Ga. 1989).

This Circuit has affirmed that the principle that public official "may not retaliate against individuals or associations for their exercise of First Amendment rights . . ." Georgia Association of Educators b. Gwinnett County School District, 856 F.2d 142, 145 (11th Cir. 1988). Sheriff Navarro argues that this principle applies only to public employees. However, the Eleventh Circuit has not limited its application to that context, but rather has expressly extended its protection to a variety of situations. See, e.g., Georgia Association of Educators, 856 F.2d at 145 & n. 4 (association engaged in advocacy); Little v. City of North Miami, 805 F.2d 962, 967-68 (11th Cir. 1986) (counsel engaged in litigation against a municipality); Bridges v. Russell, 757 F.2d 1155, 1156 (11th Cir. 1985) (prisoner); Cate v. Oldham, 707 F.2d 1176, 1189 (11th Cir. 1983) (civil defendant sued by government for malicious prosecution); Wilson v. Thompson, 593

F.2d 1375, 1377 (5th Cir. 1979) (criminal defendant).[1]

Although neither the Supreme Court of the United States nor the Eleventh Circuit has been presented with a claim of official retaliation raised specifically by a newspaper or independent contractor, the Fifth Circuit Court of Appeals has indeed addressed this precise factual scenario. In North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330,1337 (5th Cir. 1986), the Fifth Circuit ruled that the First Amendment prohibits a public official from withdrawing legal advertising from a publication which is critical of his/her actions. Additionally, in a case holding the Fifth Amendment privilege of self-incrimination applicable to public contractors, the Supreme Court analogized the latter to public employees:

> The State nevertheless asserts that whatever may be true of state employees, a different rule is applicable to public contractors such as architects . . . We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor.

Lefkowitz v. Turley, 414 U.S. 80, 83, 94 S.Ct. 316, 325, 38 L.Ed.2d

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[1] In Bonner v. City of Prichard, 6661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

274 (1973). See also id. at 83 n. 3, 94 S.Ct. at 325, n. 3 ("'The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.'" (citation omitted)).

Based on the foregoing, the Court concludes that at the time Sheriff Navarro terminated legal advertising with The Broward Review, "in light of pre-existing law the unlawfulness of [his conduct was] apparent." Anderson v. Creighton, 483 U.S. Sat. 640, 107 S.Ct. at 3039 (1987).

It is therefore

ORDERED and ADJUDGED that Sheriff Navarro's motion for new trial (rehearing)/motion to amend or alter on the grounds of qualified immunity is DENIED.

DONE and ORDERED in Chambers at Miami, Florida this 22nd day of June, 1990.

JAMES W. KEHOE
U.S. DISTRICT JUDGE

cc: Bruce N. Jolly, Esq., Laura Besvinick, Esq., Amy Glickman, Esq., Alexander Cocalis, Esq.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-5626

D. C. Docket No. 89-1187-CIV-JWK

REVIEW PUBLICATIONS, INC.,

Defendant,

AMERICAN LAWYER MEDIA, P.A.,

Plaintiff-Appellee,

versus

NICHOLAS G. NAVARRO, Individually
and in his Official Capacity as
Sheriff of Broward County, Florida,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
(August 16, 1991)

BEFORE TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and WILLIAMS*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.
"Costs taxed against defendant-appellant."

*Honorable Jerre S. Williams, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

Judgement Entered: August 16, 1991
For The Court: Miguel J. Cortez, Clerk
By: _____
Karleen McDobb, Deputy Clerk

ISSUED AS MANDATE: NOV 12, 1991

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5626

REVIEW PUBLICATIONS, INC.,

Defendant,

AMERICAN LAWYER MEDIA, P.A.,

Plaintiff - Appellee,

versus

NICHOLAS G. NAVARRO, Individually and in his official capacity as Sheriff of Broward County, Florida,

Defendant - Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and WILLIAMS*, Senior Circuit Judge.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be Polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor or it (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

JOEL F. DUBINA, UNITED STATES CIRCUIT JUDGE

*Honorable Jerre S. Williams, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

No. 91-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NICHOLAS G. NAVARRO, SHERIFF OF BROWARD COUNTY,

Petitioner,

—v.—

REVIEW PUBLICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT REVIEW PUBLICATIONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

SUSAN BUCKLEY
AMY GLICKMAN
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
New York, New York

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record

QUESTION PRESENTED

Whether the court below correctly held that a sheriff was not entitled to avoid personal liability, under the doctrine of qualified immunity, for having severed a 20-year advertising relationship with a newspaper to retaliate against it for publishing an article criticizing his performance of his official duties.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1235

NICHOLAS G. NAVARRO, SHERIFF OF BROWARD COUNTY,

Petitioner,

—v.—

REVIEW PUBLICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT REVIEW PUBLICATIONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Review Publications, Inc. ("Review Publications")[1] respectfully submits that a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and because the decision below is in all respects correct.

1 Pursuant to Supreme Court Rule 29.1, Review Publications advises the Court that American Lawyer Media, L.P., a limited partnership affiliated with Time Warner Inc., owns all the assets of Review Publications, including the *Broward Review*.

STATEMENT OF THE CASE

On November 17, 1988, the *Broward Review*, a newspaper published every weekday throughout Broward County, Florida, published on its front page a news story bearing the headline "NAVARRO FAILED TO ACT ON CORRUPTION WARNINGS". The article was accompanied by a large photo of Broward County Sheriff Nicholas G. Navarro ("the November 17th article"). Pet. App. 4-5 (¶ 11).[2] The article reported that Sheriff Navarro had failed to investigate serious charges that a drug trafficker had bribed members of his staff. *Id.* That very morning, shortly after he learned about the article and in direct retaliation for it, Sheriff Navarro personally ordered his subordinates to terminate a 20-year practice of placing public notices for sheriff's sales and forfeiture proceedings in the *Broward Review*. Pet. App. 5-7, 8 (¶¶ 14-18, 24).[3] This litigation ensued.

On June 7, 1989, Review Publications, owner of the *Broward Review*, instituted this action against Sheriff Navarro and Broward County before the United States District Court for the Southern District of Florida.[4] The Complaint, which was brought under 42 U.S.C. § 1983 (1988), alleged that Sheriff Navarro, as the highest ranking law enforcement offi-

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2 References to "Pet. App. _____" are to pages of the appendix to the petition for a writ of certiorari. References to "Pet. _____" are to the petition itself.

3 The district court determined that on the morning of November 17, 1988, "Commander Judy Meyer of the Broward Sheriff's Office Civil Division was called out of a Commanders' Meeting by one of the Sheriff's secretaries to take a telephone call from Sheriff Navarro. In that telephone conversation, Sheriff Navarro ordered Commander Meyer 'not to use *The Broward Review* in the future.' " Findings of Fact and Conclusions of Law, ¶ 17 (Record Excerpts at tab 7). The text of this finding of fact reprinted at Pet. App. 5-6 (¶ 16) omits the word "future".

4 The Complaint initially named Sheriff Navarro as a defendant in both his official and individual capacities. The district court later granted Broward County's motion, to which plaintiff consented, to dismiss plaintiff's claim against the Sheriff in his official capacity because it was redundant of the claim against the County.

cer of Broward County, had personally decided to withhold Broward County advertising from plaintiff's newspaper in retaliation and as punishment for the exercise of its First Amendment right freely to report about Sheriff Navarro and the workings of the Broward County Sheriff's Office. The plaintiff sought injunctive relief and compensatory damages against Sheriff Navarro and Broward County. Punitive damages were also sought against Sheriff Navarro in his personal capacity.

At the conclusion of a two-day trial before United States District Judge James W. Kehoe, the court ruled in favor of the plaintiff. Based on his own evaluation of the credibility of the witnesses, Judge Kehoe found that despite Sheriff Navarro's sworn testimony to the contrary,[5] the evidence demonstrated "that Sheriff Navarro's decision to terminate advertising of Sheriff's sales and forfeiture proceedings in the *Broward Review* was substantially motivated by retaliation for the publication of the November 17th article." Pet. App. 14 (¶ 6). The district court also concluded that "[b]ecause Sheriff Navarro fully understood and reasonably should have known that a public official cannot retaliate against a newspaper for its exercise of First Amendment rights," the Sheriff was not permitted to avoid liability under the doctrine of

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5 Despite the undisputed evidence that the Sheriff's decision to cease advertising in the *Broward Review* was communicated to his subordinates on the very morning on which the article criticizing the Sheriff was published, Pet. App. 5-7 (¶¶ 14-18), that the Sheriff gave no contemporaneous explanation for his decision to his subordinates or to the *Broward Review*, Pet. App. 8 (¶ 25), and that the Sheriff criticized the *Broward Review* in general and the November 17th article about him in particular, Pet. App. 6, 7 (¶¶ 17, 19), Sheriff Navarro took the stand at the trial and denied under oath that his decision to terminate advertising had been affected by the article about him or his reaction to it. Trial Transcript, vol. II, at 41. On the contrary, he testified at trial that the sole reason for his terminating advertising in the *Broward Review* was to advertise in a newspaper of wider circulation. Pet. App. 8 (¶ 25).

qualified immunity. Pet. App. 15 (¶ 9).[6] The district court ordered judgment to "be entered in favor of the Plaintiff against the County for the action of Sheriff Navarro in his official capacity and against Sheriff Navarro in his personal capacity." Pet. App. 17. It awarded compensatory damages against both defendants in the amount of $22,710.14, but declined to award injunctive relief or punitive damages. *Id.*

In a subsequent four-page opinion, the district court denied Sheriff Navarro's motion for a new trial (or in the alternative to alter or amend the judgment) based on his argument that liability should not have been imposed against him in his individual capacity by virtue of the doctrine of qualified immunity. Pet. App. 21-25. The court undertook a detailed analysis of the law at the time of the conduct in question and reiterated, quoting from this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987), that " 'in light of pre-existing law the unlawfulness of [Sheriff Navarro's conduct was] apparent.' " Pet. App. 25.

Sheriff Navarro appealed from the judgment, but Broward County (which is also liable for the full amount of the judgment) did not. On August 16, 1991, the United States Court of Appeals for the Eleventh Circuit unanimously affirmed, without opinion, the judgment against Sheriff Navarro. Sheriff Navarro's petition for rehearing and suggestion for rehearing en banc was denied on November 1, 1991, no member of the court having requested that a vote on rehearing be taken.

SUMMARY OF ARGUMENT

The unworthiness of this case for review by this Court is demonstrated at the outset by the fact that none of the abstract issues identified in the petition, all of which relate to the definition of "clearly established" law for the purpose of

6 The district court's detailed Findings of Fact and Conclusions of Law are set forth, albeit inaccurately, at Pet. App. 1-17. *See* n.3, *supra*. Respondent relies upon and incorporates the district court's findings and conclusions as if fully set forth herein.

qualified immunity analysis, are of actual relevance to the case. The judgment below, as the district court itself held, falls squarely within a long line of "well-settled" authority "that '[t]he Government may not retaliate against individuals or associations for their exercise of First Amendment rights . . .' " Pet. App. 11 (¶ 2), quoting *Georgia Ass'n of Educators* v. *Gwinnett County School District*, 856 F.2d 142, 145 (11th Cir.), *reh'g denied*, 862 F.2d 879 (11th Cir. 1988). Petitioner points to no intercircuit conflict regarding this "settled" line of authority; to the contrary, he acknowledges a total identity of views of the two circuit courts of appeals that have considered this principle in suits by newspapers against county officials who severed advertising relationships to punish the newspapers for publishing articles critical of the officials' performance in public office. Pet. 11. Petitioner's attempt to concoct a purported intercircuit controversy on more abstract questions relating to the definition of "clearly established" law—even if these issues remained in controversy after this Court's elucidation of them in *Anderson* v. *Creighton*, 483 U.S. 635 (1987)—has no bearing on the correctness of the decision below.

ARGUMENT

THE ELEVENTH CIRCUIT'S APPLICATION OF A LONG-ESTABLISHED PRINCIPLE OF CONSTITUTIONAL LAW RAISES NO ISSUE WORTHY OF THIS COURT'S CONSIDERATION

There has never been any dispute in this case that where a sheriff is "personally involved in the acts depriving [plaintiff] of his constitutional rights," he can be personally liable for damages. *Ancata* v. *Prison Health Services, Inc.*, 769 F.2d 700, 706 (11th Cir. 1985). Nor has there been any dispute that the doctrine of "qualified immunity" protects only "government officials performing discretionary functions . . . [whose] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

The standard set by *Harlow* was reaffirmed and clarified by this Court in *Anderson* v. *Creighton*, *supra*, 483 U.S. at 640. In *Anderson*, this Court addressed and established the definition of a "clearly established" right for purposes of evaluating a qualified immunity defense asserted by federal law enforcement officers. This Court concluded that a wholly generalized claim of unconstitutional conduct—such as a claim that a defendant was denied "due process"—will not suffice to overcome such a defense. *Id.* This Court went on to hold that

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful*; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (emphasis added; citations omitted). In spite of this Court's express elucidation of the meaning of "clearly established" law in the qualified immunity context, Sheriff Navarro purports to seek more specific guidance from this Court as to abstract issues relating to the law of qualified immunity. As none of these issues are of actual relevance to the resolution of this case, however, their resolution by this Court would not affect the outcome below. Moreover, even if these issues were a matter of intercircuit conflict (which they are not), respondent respectfully submits that this case does not offer an appropriate or meaningful context for their clarification by this Court.

Sheriff Navarro first claims that "[t]he broadly defined principle of law used by the trial judge violated the standard established in *Anderson*, *supra*." Pet. 9. The legal principle applied by the courts below was not "a broadly stated legal truism, 'e.g., public officials shall not abridge freedom of

speech,' " as described by petitioner, Pet. 15-16, however, but the much more focused rule that " 'although the government may generally choose to place its advertising where it will, it may not make this decision in a fashion designed to punish a newspaper's constitutionally-protected speech.' " Pet. App. 12 (citing a pre-trial stipulation between plaintiff Review Publications and defendant Broward County). Indeed, the "proper 'fact specific' inquiry" proposed by petitioner, Pet. 9,[7] is *less* "particularized" than the rule actually applied by the courts below.

In any event, the "level of generality at which the relevant 'legal rule' is to be identified," *Anderson* v. *Creighton*, *supra*, 483 U.S. at 639, is not a matter of controversy among the circuits in light of *Anderson*'s guidance on the subject. *See* M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 920, at 534-35 (2d ed. 1991) ("[M]ost circuit courts have adopted a flexible approach, requiring some, but not precise, factual correspondence between the conduct at issue and the pertinent precedents.").[8]

Nor is there an intercircuit conflict regarding the second issue raised by petitioner: "what level of court decision (*i.e.*, district, circuit, or Supreme Court) is required to create a clearly established principle of law against which a public official's conduct can be judged." Pet. 10.[9] *See* M. Schwartz

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7 " '[S]hould a public official, in a situation like that confronted by Navarro, know or have reason to believe that he could not terminate a business relationship with a private company (a newspaper publisher) because that private company (newspaper publisher) did not support his policies or was otherwise publicly critical of his performance.' " Pet. 9.

8 Petitioner's suggestion, Pet. 10 n.1, that an internal conflict exists in the Eleventh Circuit regarding the definition of "clearly established" law, even if correct, is clearly not the sort of issue that merits review by this Court. Sup. Ct. R. 10.

9 The cases cited in the petition (at 14-15) to support the contention that the Third and Eighth Circuits "have bluntly held that no point of law is clearly established until it is decided by the United States

& J. Kirklin, *supra*, at 536 ("The circuit courts generally agree that there need not be a decision on point of the United States Supreme Court, or even of the particular circuit, for the law to be clearly established."). In any event, there was ample authority issued from this Court, the Eleventh Circuit itself, and the Fifth Circuit which fully supported the decisions below.

As long ago as 1972, in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), an action brought under 42 U.S.C. § 1983 by a state college professor who claimed that the college had failed to renew his annual employment contract in retaliation for his public criticism of its policies, this Court held:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Supreme Court" hardly stand for this proposition. *See Chincello* v. *Fenton*, 805 F.2d 126, 134 (3d Cir. 1986) ("[T]his is not a case in which there is a Supreme Court case or a consensus among the circuits endorsing the legal norm the defendant official is alleged to have violated."); *Schlothauer* v. *Robinson*, 757 F.2d 196, 197 (8th Cir. 1985) (per curiam) (where state law had expressly permitted the defendant law enforcement officer's warrantless felony arrest in a suspect's home and the Supreme Court had " 'expressly left open' " the issue of the constitutionality of such an arrest, there was no clearly established constitutional violation).

408 U.S. at 597. The Court recognized in *Perry* itself that it had applied the principle that government officals cannot penalize the exercise of First Amendment rights in a wide variety of circumstances. *Id. See, e.g., Speiser* v. *Randall*, 357 U.S. 513 (1958) (veterans cannot be denied state tax exemptions on the basis of their refusal to take a loyalty oath); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (government may not penalize welfare applicant by withholding benefits on the basis of her religious-based refusal to work on Saturdays); *Thomas* v. *Review Board, Indiana Employment Security Division*, 450 U.S. 707 (1981) (state cannot deny unemployment benefits to applicant on the ground that he refused, for religious reasons, to work in the arms production industry).

Moreover, as the district court below correctly held,

> [The Eleventh] Circuit has affirmed [ ] the principle that public official[s] "may not retaliate against individuals or associations for their exercise of First Amendment rights . . ." *Georgia Association of Educators* v. *Gwinnett County School District*, 856 F.2d 142, 145 (11th Cir. 1988) . . . [T]he Eleventh Circuit . . . has expressly extended [the principle's] protection to a variety of situations. *See, e.g., Georgia Association of Educators*, 856 F.2d at 145 & n.4 (association engaged in advocacy), *Little* v. *City of North Miami*, 805 F.2d 962, 967-68 (11th Cir. 1986) (counsel engaged in litigation against a municipality); *Bridges* v. *Russell*, 757 F.2d 1155, 1156 (11th Cir. 1985) (prisoner); *Cate* v. *Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983) (civil defendant sued by government for malicious prosecution); *Wilson* v. *Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979) (criminal defendant).

Pet. App. 23. And, as the petition itself concedes, the decision below reflects the total agreement of the United States Courts of Appeals for the Fifth and Eleventh Circuits on the principle that the First Amendment bars public officials from retaliating against newspapers that criticize their performance

in public office by withdrawing government advertising from their pages. *See North Mississippi Communications, Inc.* v. *Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986).[10] In a similar case involving the punitive withdrawal of funding from a state university newspaper by the university president, *Joyner* v. *Whiting*, 477 F.2d 456, 460 (4th Cir. 1973), the Fourth Circuit also reaffirmed "the precept that freedom of expression may not be infringed by denying a privilege [,]" citing *Sherbert* v. *Verner*, *supra*, 374 U.S. at 404.

Given the clarity of the law in this area, and given its application to protect a variety of individuals and entities, the court below was amply justified in affirming the trial court's conclusion that Sheriff Navarro "fully understood and reasonably should have known," Pet. App. 15 (¶ 9), that his conduct could not be squared with the First Amendment. The petition's suggestion that the Sheriff was entitled to qualified immunity because no decision of this Court or of the Eleventh Circuit "involved a public official's decision to cease advertising in a private newspaper," Pet. 16,[11] completely

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10 Inexplicably, petitioner attempts to cast doubt on the Fifth Circuit holding in 1986 in *North Mississippi Communications* v. *Jones*, *supra*, that "it would violate the Constitution for the [County] Board to withhold public patronage, in the form of its advertising, from the Times in retaliation for that newspaper's exercise of first amendment rights", 792 F.2d at 1337, because the Fifth Circuit in that opinion *reversed* a directed verdict in favor of the defendant public officials and remanded the case for factual findings on the question of whether the officials' motivation for their action against the newspaper was indeed retaliatory. Pet. 12-13; *see also* 792 F.2d at 1337. The Fifth Circuit has reiterated its 1986 holding in two subsequent opinions in the same litigation. *See* 874 F.2d 1064, 1065 (5th Cir. 1989); 951 F.2d 652 (5th Cir. 1992).

11 Despite its suggestion that only decisions of this Court or the Eleventh Circuit involving retaliatory government withdrawal of advertising from a newspaper would be binding on the Sheriff, Pet. 16, the petition cites to an unrelated line of cases issued out of other circuits, all of which involved a completely different kind of allegation: chal-

ignores *Anderson*'s holding that "[t]his is not to say that an official action is protected by qualified immunity unless the very action is question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, *supra*, 483 U.S. at 640. The logical result of petitioner's argument is that

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lenges by independent contractors to dismissals based solely on their political affiliation. Pet. 17, citing *Triad Associates, Inc.* v. *Chicago Housing Authority*, 892 F.2d 583, 585 (7th Cir. 1989) (alleged retaliatory replacement of plaintiff security services contractor with contractor "who supported the political aspirations of [the Chairman of the City Board of Commissioners] and the [Mayor Harold] Washington administration"); *Messer* v. *Curci*, 881 F.2d 219, 220 (6th Cir. 1989) (en banc) ("allegation of political patronage hiring [of seasonal maintenance workers], standing alone, does not state a claim for violation of 42 U.S.C. § 1983"), *vacated and remanded*, 110 S. Ct. 3233 (1990); *Horn* v. *Kean*, 796 F.2d 668, 669 (3d Cir. 1986) (en banc) (plaintiffs "allege[ ] that their dismissals as motor vehicle agents were based on political party affiliation"); *LaFalce* v. *Houston*, 712 F.2d 292, 293 (7th Cir. 1983) (plaintiff alleges that city Mayor " 'award[ed] the contract to another bidder, Ace Sign Company, because the operators of Ace Sign Company were political supporters of Defendant [Mayor] while Plaintiff was not' "); *Sweeney* v. *Bond*, 669 F.2d 542, 544 (8th Cir. 1982) ("Plaintiffs [fee agents] alleged their dismissals were based solely on their political affiliation. . . ."") (footnote omitted); *Fox & Co.* v. *Schoemehl*, 671 F.2d 303, 304 (8th Cir. 1982) ("[P]laintiffs' complaint alleged that defendant Vincent Schoemehl and his Chief of Staff, John Temporiti, dismissed plaintiffs as city auditors solely because of plaintiffs' political affiliation. . . ."); *Rivera Diaz* v. *Puerto Rico Telephone Co.*, 724 F. Supp. 1069, 1070 (D.P.R. 1989) ("Plaintiff [contractor] further contends that it was the policy of the PRTC [Puerto Rico Telephone Company] and the Individual Defendants to give preference to members of the PDP [Popular Democratic Party] and to discriminate against members of other political parties. . . ."). These cases are completely different in their constitutional underpinnings and their facts from this one, in which there was not one iota of evidence in the record to suggest that the *Broward Review* had any particular political loyalty or affiliation, let alone that the Sheriff knew and disliked any such supposed affiliation. Instead, the evidence was overwhelming that the Sheriff was engaged not in an act of political patronage arguably sanctioned by custom, but in an effort at retaliation against a newspaper that had reported on his office's neglect of public duty.

a public official will be absolutely immune from liability, except in the unlikely event that this Court has previously passed on the unlawfulness of the particular action taken by the official against the particular type of entity or individual. *Anderson* rejected such a rule. *Anderson* is clearly controlling in the context of this case, as the district court below correctly held. Pet. App. 25.

Finally, issues raised by petitioner regarding the appropriate " 'buffer' period between the date that a legal right becomes clearly established and the date at which a public official is charged with having operating knowledge of the existence of that legal right," Pet. 10, and the effect of pending appellate proceedings on a clearly established legal principle, *id.*, could not appropriately be decided in the context of this case, as their resolution would have absolutely no bearing on its outcome. All the opinions relied on by the courts below in rejecting the Sheriff's qualified immunity defense were decided well before November 17, 1988, the date on which the Sheriff ordered his subordinates to withdraw advertising from the *Broward Review*.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 2, 1992

Respectfully submitted,

Of Counsel:

SUSAN BUCKLEY
AMY GLICKMAN
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
New York, New York

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record